IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 325 of 2007
In
SPECIAL CIVIL APPLICATION No. 17056 of 2003
With
CIVIL APPLICATION No. 4258 of 2007
In LETTERS PATENT APPEAL No. 325 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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EXECUTIVE ENGINEER - Appellant(s)
Versus
SHANKARBHAI JIVABHAI PATEL - Respondent(s)

Appearance :
MS SEJAL K MANDAVIA for Appellant(s) : 1,
MR PH PATHAK for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. By instant intra-court appeal under clause 15 of the Letters Patent, appellant/original petitioner – Executive Engineer, District Panchayat, Bharuch ('the employer' for short) seeks to challenge the order dated 10.3.2006 rendered in Special Civil Application No. 17056 of 2003 by the learned Single Judge of this Court by which prayer to quash and set aside the judgment and award dated 31.1.2003 rendered by Labour Court, Bharuch, in Reference (LCB) No.602 of 1990 (Old (LCB) No. 955 of 1989) directing the employer to reinstate the respondent workman

('workman' for short) with continuity of service as well as 35% backwages for the interim period has been refused and thereby the petition filed by the employer under Articles 226 and 227 of the Constitution of India against the workman has been dismissed by treating it as a petition filed under Article 227 of the Constitution of India.

2. As per the case of the workman, he joined the service of the employer on the post of wireman, as daily wager, from 11.8.1983 to 9.9.1984. The employer had given work to the workman as a work-charged wireman from 10.9.1984 to 31.1.1987 by giving him appointment order for 29 days on contract basis, in the pay scale of Rs.260-400. According to the workman, his services came to be terminated without any reason or justification and without affording any opportunity, on 1.2.1987. He, therefore, approached the Conciliation Officer wherein he filed the statement of claims. On failure of conciliation proceedings, the Conciliation Officer referred

the dispute to the Labour Court on 28.9.1989 for adjudication.

2.1. The reference was contested by the employer by filing reply at Ex.14, wherein, inter alia, it was contended that the Labour Court has no jurisdiction as the Civil Services Tribunal Act, 1972 was applicable to the workman concerned. It was also stated that the workman was appointed by the employer without following legal and due procedure under the Panchayat Service Rules. It was also contended that the workman was appointed for 29 days which was on contract basis and such type of appointments were given from 10.9.1984 to 31.1.1987 and on the next day i.e., 1.2.1987 the contract was not renewed and, therefore, the services of the workman automatically came to an end by afflux of time and, according to the employer, there was no termination of service from their side but the services of the workman came to an end automatically by afflux of time.

2.2. The Labour Court, after considering the oral as well as documentary evidence produced by both the parties, came to the conclusion that there was no justification with the employer in giving such type of orders of appointments on contract basis and such type of periodical appointments on contract basis were without any justification from the employer, a public body, and it created some doubt that such type of policy was adopted for denial of legal rights of the workman or to avoid the compliance of statutory provisions. Therefore, the Labour Court, after considering Section 2 (oo) (bb) of the Industrial Disputes Act, 1947 ('the Act' for short) which gives power or authority to the employer to appoint an employee on contract basis by giving periodical appointments, interpreted the word 'contract' and came to the conclusion that such kind of appointment by giving artificial breaks for one or two days amounts to unfair labour practice adopted by a public body.

The Labour Court came to the conclusion that such type of break was artificial and such type of tactics have been adopted by the employer to deny legal benefits which were available to the workman under the law. Ultimately it was held that the workman had completed continuous service of 240 days in the calendar year prior to his appointment under the so-called contractual appointment orders and at the time of terminating the service, provisions of Section 25F of the Act have not been complied with and, therefore, the Labour Court on the basis of the aforesaid findings, set aside the order of termination and directed the employer to reinstate the workman in service. Thereafter the Labour Court considered the question of backwages and considering the fact that the reference was more than 14 years old, granted 35% backwages for the interim period and the employer was directed to reinstate the workman with continuity of service with 35% backwages.

3. Aggrieved by the said order of granting reinstatement with continuity of service and 35% backwages, the employer filed Special Civil Application No.17056 of 2003 whereas aggrieved by granting only 35% backwages the workman also filed Special Civil Application No.9680 of 2004 which were placed for hearing before the learned Single Judge of this Court.

4. The learned Single Judge, on reappraisal of the evidence and perusal of the award which was impugned before him and also the evidence on record, came to the conclusion that the Labour Court had rightly exercised the powers so far as granting of reinstatement in service with continuity of service as well as 35% backwages is concerned.

4(i) However, the learned Single Judge has also observed that the during the pendency of the petition, on 18.10.2004, an interim order was passed and by that interim order the employer

was directed to reinstate the workman and the said order was implemented by the employer. At the time of final hearing of those two petitions on 10.3.2006 it was noticed that in pursuance of the order dated 18.10.2004 the workman was reinstated but he would reach the age of superannuation on 31.3.2006 and, therefore, further question of implementation of order of reinstatement does not arise.

4(ii) The learned Single Judge did not interfere with the granting of continuity of service with 35% backwages. The learned Single Judge has also observed that 35% backwages granted to the workman also does not require any interference. He, therefore, dismissed both the petitions filed by the employer as well as by the workman. It is this judgment which has give rise to instant intra- court appeal at the instance of the employer.

5. This appeal was admitted and in Civil

Application rule came to be issued by a Division Bench of this court vide order dated 21.3.2007.

6. Today when the matter came up for hearing, Mr. PH Pathak, learned advocate for the workman, has raised a preliminary objection that the appeal under clause 15 of the Letters Patent is not maintainable against the order of the learned Single Judge rendered in a petition filed under Article 227 of the Constitution. He has also drawn our attention to the prayer clause of Special Civil Application No.17056 of 2003 wherein the prayer to issue writ was not claimed. In that petition the prayer was to quash and set aside the award dated 31.1.2003 rendered in Reference (LCB) No. 602 of 1990 by the Labour Court, Bharuch. Therefore, according to him, though the petition filed before the learned Single Judge was purported to be filed under Articles 226 ad 227 of the Constitution of India, in fact the learned Single Judge considered the petition as one filed under Article 227 of the

Constitution of India and, therefore, this intra-court appeal is not maintainable.

6(i) According to him, even on merits also, there is no substance in the appeal. He has submitted that, the Labour Court has rightly passed the award and the finding of fact recorded by the Labour Court has been confirmed by the learned Single Judge which does not require any interference of this Court in this intra-court appeal filed under clause 15 of the Letters Patent.

6(ii) Besides this, it is also submitted by him that pursuant to the interim order passed by this Court, the workman was reinstated in service and on his reaching the age of superannuation on 31.3.2006 he has been retired and, therefore, there is no question of even examining the question of reinstatement in service, on merit.

6(iii) Therefore, according to him, this intra-

court appeal is not maintainable and on merits also there is no ground to interfere with the judgment rendered by the learned Single Judge and, therefore, the appeal deserves to be dismissed. He, therefore, urged to dismiss the appeal.

7. Per contra, Ms. Sejal Mandavia, learned advocate for the employer, has contended that the employer had filed the writ petition under Articles 226 and 227 of the Constitution of India and prayed for the relief to quash and set aside the judgment and award dated 31.1.2003 passed by the Labour Court, Bharuch in Reference (LCB) No. 602 of 1990 (Old (LCB) No.955 of 1989). According to her, since the petition was filed both under Articles 226 and 227 of the Constitution of India, this intra-court appeal is maintainable against the order passed by the learned Single Judge of this Court in such a petition.

7(i) It is also emphatically submitted by her

that in pursuance of the interim order passed by this Court the workman was reinstated in service and he has already been superannuated on 31.3.2006 on reaching the age of superannuation. Therefore, there is no question of reinstating the workman, on merits. So far as the directions for granting continuity of service and also 35% backwages are concerned, they are against the evidence on record. The Labour Court has misdirected itself in passing the said order without any evidence and, therefore, the said order which is affirmed by the learned Single Judge is required to be interfered with in this appeal. It is also pointed out by her that if the order is confirmed, it would create burden on the appellant, i.e., on public exchequer, because granting of retirement benefits would include pension, gratuity and also 35% backwages. She, therefore, submitted that this Court may interfere with the impugned order passed by the Labour Court which is affirmed by the learned Single Judge. She further submitted that there is

merit in the appeal and it requires to be allowed. She, therefore, urged to allow the appeal.

8. We have considered the submissions advanced at the bar by the learned advocates for the parties. We have also considered the impugned order passed by the Labour Court as well as the learned Single Judge and the reported decisions of the Supreme Court of India as well as this Court.

9. It may be noted that since the order of reinstatement has been implemented pursuant to the interim order passed by this Court and the workman has already been superannuated on 31.3.2006 on his reaching the age of superannuation, there is no necessity to examine the question with regard to reinstatement of the workman in service. The only question to be decided is with regard to continuity of service with backwages.

10. Since Mr. PH Pathak, learned advocate for the workman, has raised a preliminary objection about the maintainability of the appeal filed under clause 15 of the Letters Patent against the order passed by the learned Single Judge in a petition filed under Article 227 of the Constitution, let us examine as to whether the learned Single Judge has exercised powers either under Article 226 or Article 227 or only under Article 227 of the Constitution of India while deciding the petitions, in light of the reported decisions of the Supreme Court of India as well as this Court.

11. In the case of Kanhaiyalal Agrawal and others v. Factory Manager, Gwalior Sugar Company Limited, (2001) 9 SCC 609, question of maintainability of an appeal filed under clause 15 of the Letters Patent against an order made in a writ petition filed under Articles 226 and 227 of the Constitution challenging the order passed by the Industrial Tribunal arose

before the Supreme Court. While answering the said question, the Supreme Court in para 6 of the judgment noticed that so far as the law on the matter is concerned, as to whether an appeal would lie against an order made in writ petition before the High Court challenging an order of the Labour Court, the Supreme Court in its earlier decision in Lokmat Newspapers (P) Ltd. v. Shankarprasad, (1999) 6 SCC 275 has already stated that if a Single Judge exercises jurisdiction under Article 226, Letters Patent Appeal would be maintainable, but if the jurisdiction is exercised under Article 227 it will not be maintainable with a rider that if the Single Judge of the High Court in considering the petition under Article 226 or Article 227 does not state under which provision he has decided the matter and where the facts justify filing of petition both under Article 226 and Article 227 and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an

appeal. The Supreme Court held as aforesaid in view of the decisions of the Supreme Court in Umaji Keshao Meshram's case (supra), Ratnagiri District Central Cooperative Bank Limited v. Dinkar Kashinath Watve, 1993 Supp (1) SCC 9 and Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha, 1993 Supp (1) SCC 11.

12. Similar question arose before a Division Bench of this Court of which one of us (A.M. Kapadia, J.) was a member in the case of Steel Authority of India Limited v. Gujarat Mazdoor Panchayat and another, 2004 (1) GLR 729. In the said case, the Division Bench has considered the question as to when the award of the Industrial Tribunal challenged in a writ petition filed both under Articles 226 and 227 of the Constitution, under what circumstances the petition taken to have been filed only under Article 227 of the Constitution of India. The Division Bench has made pertinent observations in paragraph 34 of the reported decision as under:

"....It is now well established that the award of the Tribunal can be challenged by an aggrieved party, both under Art.226 or 227 of the Constitution or under both the Articles. However, choice is with the aggrieved party. Whether aggrieved party has chosen to approach the High Court under Art.226 or 227 has to be ascertained not only from the pleadings, but also from the facts, whether the Tribunal whose award is challenged is impleaded as one of the necessary parties in the petition. In Udit Narain Singh Malpaharia (supra) the Supreme Court has ruled that the Tribunal is not a necessary party where the petition is filed under Art.227 of the Constitution, but the Tribunal is a necessary party if the petition is filed under Art.226 of the Constitution and appropriate reliefs are claimed. Here, in instant case, the petitioner has not impleaded the Industrial Tribunal as one of the respondents in the petition nor claimed any relief as such against the Industrial Tribunal. This conduct

on the part of the writ petitioner in not impleading the Industrial Tribunal as one of the respondents in the petition and in not claiming any specific relief against the Tribunal would indicate that the writ petitioner has chosen to approach the High Court under Art.227 of the Constitution....”

13. Applying the principles laid down by the Supreme Court as well as this Court in the above referred two judgments to the facts of the instant case, it is true that the employer filed the petition by labelling it under Articles 226 and 227 of the Constitution of India. The learned Single Judge treated the petition under Article 227 of the Constitution of India. Besides this, from the perusal of the prayers made in the petition, it is seen that the employer has not prayed for issuance of writ of certiorari but it has prayed only to quash and set aside the judgment and order passed by the Labour Court. The employer has not impleaded the Labour Court as party as per the reported decision of this

Court in Steel Authority of India's case (supra).

14. A Division Bench of this Court of which one of us (A.M. Kapadia, J.) was a member, in the case of Dilipbhai Maneklal Vyas v. Torrent Power A.E.C. Co., in Letters Patent Appeal No.1205 of 2006, vide order dated 18.6.2007 has held that if the petition is filed under Article 227 of the Constitution, intra-court appeal under clause 15 of the Letters Patent is not maintainable.

15. Therefore, in aforesaid view of the matter, according to us, the petition filed by the employer was essentially a petition under Article 227 of the Constitution. Therefore, this intra-court appeal filed at the instance of the employer under clause 15 of the Letters Patent is not maintainable.

16. Seen in the above context, the appeal deserve to be dismissed as it is not maintainable.

17. As the appeal is not maintainable, it is dismissed with no order as to costs.

18. As the appeal is dismissed, the Civil Application is also rejected with no order as to costs. Rule is discharged.

(A.M. Kapadia, J.)

(Harsha Devani, J.)

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